No. 84-233

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PHILLIPS PETROLEUM COMPANY,
Petitioner,

v.

IRL SHUTTS and ROBERT ANDERSON and BETTY ANDERSON, Individually and as representatives of all producers and royalty owners to whom Phillips Petroleum Company made payment of suspended proceeds of royalties pursuant to Federal Power Commission Opinion Nos. 699, 699H, 749, 749C, 770 and 770A,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Kansas

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REPLY OF PHILLIPS PETROLEUM COMPANY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

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REPLY OF PHILLIPS PETROLEUM COMPANY[1]

I. STATE COURT JURISDICTION

Respondents challenge Phillips' standing to litigate the existence of jurisdiction over nonresident unnamed plaintiff class members, arguing that only class representatives have the right to object to the propriety of jurisdiction over class members. Contrary to the respondents' assertion, it is clear that Phillips has the right to challenge the Kansas court's jurisdiction over those class members who have no contacts with Kansas. In *Hanson v. Denckla*, 357 U.S. 235, 245 (1958), the

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[1] Phillips' statement pursuant to Sup. Ct. R. 28.1 can be found at A68 of the Appendix to Phillips' Petition for a Writ of Certiorari.

Court held that when "any defendant affected by the court's judgment has that 'direct and substantial personal interest in the outcome' that is necessary to challenge whether that jurisdiction was in fact acquired", quoting, *Chicago v. Atchison T. & S.F.R. Co.*, 357 U.S. 77 (1958). Phillips has been held liable to over 27,500 class members who have no affiliation with Kansas and whose claims are unrelated to Kansas. Phillips clearly has a "direct and substantial" interest in determining whether Kansas can constitutionally render a binding judgment under these circumstances. The impact on Phillips of this judgment is neither speculative nor merely a fear of harm that may occur in the future.

Counsel for respondents have consistently assumed that giving notice to class members is the equivalent of having the power to bind these class members. They assert that mere notice is sufficient not only to allow counsel to represent all class members but also to decide on their behalf whether to submit to jurisdiction in Kansas. This result, however, follows only if the constitutional issue presented in this case is resolved in respondents' favor. Only if this Court decides that notice and representation equals jurisdictional power can the respondents' counsel speak for the 28,100 absent class members. The petitioner has pointed out in its earlier brief, (1) this issue has never been decided by this Court, (2) respondents' position is inconsistent with this Court's precedents, such as *World-Wide Volkswagon Corp. v. Woodson*, 444 U.S. 286 (1980), and (3) the lack of any certainty on this subject has caused considerable confusion and inconsistencies of treatment throughout the nation, as evidenced by the division of authority among the states.

Moreover, respondents have misstated the position of Phillips. Phillips does not contend that a state court is without power to bind nonresidents in all circumstances. No constitutional problems arise when a plaintiff voluntarily brings an action in a foreign court and when the

harm for which recovery is sought occurred at least in part in that state. See, *Keeton v. Hustler Magazine, Inc.*, —— U.S. ——, 104 S. Ct. 1473 (1984).

The decisions of this Court also show that nonresident class members, like nonresident defendants, can be bound when there are sufficient affiliating circumstances between them and the forum so that it is fundamentally fair for that court to assent jurisdiction over them. Thus, in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), which respondents erroneously rely on for a much broader proposition, a state court could exercise jurisdiction to determine claims of nonresident "class" members to a fund established, administered and maintained in that state by a citizen of that state. In the present case, however, no circumstances exist that relate the claims of nonresidents to Kansas. The claims of these class members did not arise in Kansas and are completely unrelated to Kansas. No fund is maintained in Kansas of which ownership needs to be determined.[2] Nor did the unnamed nonresident plaintiffs voluntarily come to Kansas to institute this action. It is this lack of relationship between the nonresidents, their claims, and the forum that gives rise to the constitutional problems presented in this case.

The importance and frequency of the jurisdiction question presented by this case continues to grow. Respondents' brief itself identifies five occasions on which this

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[2] Respondents attempt to concoct a "fund" based upon language in *Shutts I*. In that case, a "fund" was fashioned of proceeds Phillips collected from pipeline purchasers. A ficticious aggregation of a portion of these sums collected under FPC suspension procedures that would either be paid to royalty owners or returned to the pipelines at the conclusion of FPC proceedings constituted a "fund." In *Shutts II*, however, Phillips was liable for interest on royalties paid for gas not even sold to pipelines. It is thus impossible to fabricate from these claims the "fund" found in *Shutts I*. Even if it was possible to fabricate a "fund" it would be impossible to establish Kansas as the situs of that "fund."

jurisdictional issue has been presented for review by this Court in the single context of Kansas state actions for interest on royalties.[3] It has arisen and is bound to arise in numerous contexts. For example, in the consumer field, this Court accepted for review *Minor v. Gillette Company*, 87 Ill. 2d 7, 428 N.E.2d 478 (1981), *cert. granted*, 456 U.S. 914, *cert. dismissed*, 459 U.S. 86 (1982), but was unable to reach the merits.

Liberal state procedures governing class actions may lead increasingly to the filing of state class actions in many different contexts. In Kansas, for example, judicial interpretation of the class action statute has rendered it more favorable to class actions than the Federal Rule. See, *Comment, The Kansas Class Action Device*, 31 Kan. L. Rev. 305 (1983). Since federal jurisdictional standards have "caused litigants similarly situated to turn more frequently to state forums to redress their common grievances . . .", *Newburg On Class Actions* § 1206 (1980 Supp.), the problems that arise from the unresolved constitutional questions presented by this case in all likelihood will escalate. Resolution is needed now; certiorari should be granted to bring some predictability to the area of multistate class actions.

II. APPLICATION OF KANSAS LAW

It is equally important to grant certiorari in this case to reverse the application of Kansas law to all class members by the court below. The Kansas court fashioned a national remedy based upon its own concept of "equity" and imposed it upon thousands of people from every

[3] See *Shutts I*, 222 Kan. 527, 567 P.2d 1292, *cert. denied*, 434 U.S. 1068; *Maddox v. Gulf Oil Corp.*, 222 Kan. 733, 567 P.2d 1326, *cert. denied*, 434 U.S. 1065; *Sterling v. Superior Oil Company*, 222 Kan. 737, 567 P.2d 1325, *cert. denied*, 434 U.S. 1067; *Nix v. Northern Natural Gas Co.*, 222 Kan. 739, 567 P.2d 1322, *cert. denied*, 434 U.S. 1067; *Phillips v. Duckworth*, —— U.S. ——, 103 S. Ct. 725 (1983).

other state and the entire oil industry. The respondents justify this on the ground that the Kansas court's notions of equity have necessarily led to a just result that this Court should not upset. The conclusion Kansas reached, however, may not be "equitable" when viewed through the eyes of one of the states with a greater interest in those leases that may have a very different vision of what is "equitable" public policy.[4]

The courts in Texas have indicated that the proper result in these cases is contrary to the result reached in Kansas. Disregarding defenses on the merits, where Texas courts award interest they have limited interest to a rate determined by the Texas legislature. See, *Phillips Petroleum Company v. Stahl Petroleum Company*, 569 S.W.2d 480 (Tex. 1978). Petitioner believes it is imperative for this Court to consider the important constitutional questions in this case and declare that a state court in a nationwide class action is not free to apply and export its notions of public policy, or "equity," to transactions and people having absolutely no affiliation with the forum whatsoever.

The uncertainty created when the Kansas court arrogates to itself the power of regulating the relationship between natural gas companies and their royalty owners throughout the United States discourages compliance with contractual obligations and breeds conflict among the states.[5] If the Kansas court can assert jurisdiction

[4] Although the oil and gas industry is "significant" in Kansas, respondents have failed to show how that justifies litigating this lawsuit or how Kansas' regulation of the oil and gas industry is more desirable than regulation by Texas, Oklahoma, Louisiana, New Mexico or Wyoming, each of which has a greater interest in the transactions underlying this lawsuit and in each of which the oil industry is also "significant."

[5] As can be seen from the amicus curiae brief filed by Amoco Production Company, payment of interest to nonresident class members pursuant to other states' laws did not prevent a suit for additional interest based on Kansas law.

and apply its own law in this case, then a Texas court could take jurisdiction over another national class of royalty owners—perhaps parties to different leases or even over the same royalty owners on claims arising after other FPC opinions—decide the same substantive issue in a diametrically opposite fashion, and that result would have to be honored everywhere else, including Kansas. The result would be total instability; everyone's rights—Phillips', the other oil or gas companies', and the royalty owners'—would be completely dependent upon who brought a class action where, first. This instability, which will not be limited to the oil and gas industry, or even to the world of commerce, can be reduced only by this Court enunciating some limitation under the full faith and credit clause on the application of forum law in state court class actions. Only if Phillips and all other national companies doing business in Kansas can have assurance as to what law will be applied to transactions on which a Kansas class action could be based will the gamble of doing business in that state be reduced.

CONCLUSION

The Petition for a Writ of Certiorari should be granted. The time has come to reduce the uncertainty engendered by these vitally important constitutional questions of state court jurisdiction and choice of law.

Respectfully submitted,

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